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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1150

DAVID H. DURHAM, et al.,

Petitioners

v.

THE MASON AND DIXON LINES, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE MASON AND DIXON LINES, INC.,

Respondent

Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review a judgment of that Court, entered on December 12, 1968, affirming an order of the District Court dismissing petitioners' complaint for "failure to exhaust the grievance procedure" (App. 2a).

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (App. 1a-3a) is reported at 404 F.2d 864. The District Court's order of dismissal (App. 4a) is not reported.

JURISDICTION

The decision of the court below was entered on December 12, 1968. This Court has jurisdiction under 62 Stat. 928, 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the exhaustion doctrine bars suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, on a claim that the employer obtained Joint Committee approval of a contract amendment by fraud, unless the fraud claim is presented to the Joint Committee?

2. Whether employees aggrieved by amendment of a contract, allegedly obtained by employer fraud, are required to seek relief from the Joint Committee before invoking Section 301?

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, reads as follows:

> Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioners, employees of Mason and Dixon Lines, hereinafter the Company, brought suit under Section 301 to invalidate a certain "Change of Operations" approved by the

Central States Joint Area Committee,[1] on the ground that approval was obtained through fraudulent misrepresentations by the Company to the employees' bargaining agents (J.A. 9a, 13a), and that the Change deprived petitioners of vested seniority rights under the governing collective bargaining contract (J.A. 8a, 13a-14a).

This District Court dismissed the suit without stating any reasons (App. 4a). The Court of Appeals affirmed on the ground (App. 2a-3a) that by failing to present to the Joint Committee their claim that "its approval [of the Change] was procured by means of fraudulent misrepresentations on the part of" the company, petitioners were in default under the "general rule" of *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652, that "prior to filing an action in a federal court under Section 301 employees must attempt to use the grievance procedure agreed to by the employer and the union."

REASONS FOR GRANTING THE WRIT

Application of the exhaustion doctrine to a claim of fraud is as unprecedented as it is unwarranted; here, as in *Glover v. St. Louis-San Francisco R.R. Co.*, No. 38, this Term, decided January 14, 1969, 89 S. Ct. 548, certiorari should be granted and the judgment reversed to preserve the rights of employees under collective bargaining agreements against superfluous obstacles and unnecessary delay.

Glover, which was announced after the decision of the Court of Appeals herein, arose under § 3 of the Railway

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[1] The court below correctly described the Change as a "change in the collective bargaining agreement" (App. 1a). There is no question but that, if contractual procedures are followed and absent fraud or bad faith, the Joint Committee is empowered to amend the contract during its life. See Mr. Justice Goldberg's concurring opinion in *Humphrey v. Moore*, 375 U.S. 335, 355. Petitioners also alleged, however, that this change was defective for want of requisite notice to and ratifying vote of the unit affected (J.A. 7a-8a).

Labor Act, 45 U.S.C. § 153(i); but this Court assimilated the exhaustion requirements under that Act (and the exceptions thereto) to those under § 301 of the LMRA. Here, as in *Glover* "doctrinaire application of the exhaustion rule would defeat the overall purposes of federal labor policy." 89 S.Ct. at 551.

1. *Republic Steel v. Maddox*, 379 U.S. 650, 653, holds the exhaustion requirement applicable only to the "normal situation," *i.e.*, where the grievance is based "simply on the contract," *ibid.*, at 657. Accord: *Vaca v. Sipes*, 386 U.S. 171, 185. Extension of the requirement to a claim that either the union or the employer obtained an amendment or interpretation of the contract by fraud is unjustified by anything in the *Maddox* opinion.

2. The court below treats *Maddox* as having reversed *Humphrey v. Moore*, 375 U.S. 335, *sub silentio*. In *Humphrey*, Moore, et al., Dealers' employees, brought suit to set aside a "dovetailing" award which, they alleged, was a product of the Union's breach of good faith and fair dealing, and in excess of the Joint Committee's powers under the contract. *Neither claim had ever been presented to the Union or to the Joint Committee by Dealers' employees.* This Court held that the state courts had properly asserted jurisdiction under Section 301 and adjudicated the claims on the merits, because, if valid, the claims "would effectively undermine the decision of the Joint Committee." 375 U.S. at 343.

It is true, of course, that, in *Humphrey*, the exhaustion claim was neither raised nor considered, but the omission can hardly be attributed to oversight; it demonstrates, rather, universal recognition that the exhaustion principle is irrelevant to claims of "undermining" based on fraud or unfair dealing.

The only distinction between this case and *Humphrey*[2] is that there fraud was attributed to the Union; here to the employer. That, we submit, is a distinction without a difference. Indeed, as we read *Humphrey*, if fraud had been charged against the employer, the individuals' right to relief under Section 301 would have been even clearer. 375 U.S. at 343, 357.

The rationale of the court below is that the Joint Committee is entitled in the first instance to pass upon claims that its action is "undermined" by fraud practiced upon it by a party. That rationale is applicable regardless of the identity of the party accused of fraud.

3. In holding the exhaustion doctrine applicable to fraud claims, the decision below is in conflict, in principle, with decisions of the Second Circuit,[3] and with the entire body of precedent, which, so far as our research reveals, is, without exception, to the contrary.[4] It is inconsistent, moreover, with Section 10 of the Uniform Arbitration Act, which authorizes judicial review, without exhaustion, of claims that the "award was procured by * * * fraud or improper means." Whether the Arbitration Act standard is applicable to Section

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[2] Apart, of course, from the fact that there the Joint Committee action was in the form of a grievance disposition and here of a contract amendment; plainly an irrelevancy.

[3] *Desrosiers v. American Cyanamid Co.*, 377 F.2d 864, 870-871 (2 Cir.); *Hiller v. Liquor Salesmen's Local No. 2*, 338 F.2d 778, 779 (2 Cir.).

[4] *Humphrey v. Moore*, 375 U.S. 335; *Bridgeport Rolling Mills Co. v. Brown*, 314 F.2d 885 (2 Cir.), cert. denied 375 U.S. 821; *Stereotypers v. Newark Morning Ledger Co.*, 201 F. Supp. 832 (D.N.J.), aff'd 397 F.2d 594 (3 Cir.); *Zeaner v. Teamsters Local 107*, 234 F. Supp. 901 (E. D. Pa.); *Fuller v. Highway Truckdrivers & Helpers, Local 107*, 233

301 is itself an important question warranting disposition by this Court.[5]

Claims that one of the parties defrauded those empowered to interpret, enforce and amend the contract are not only totally different from mere claims based upon the contract; they are inherently more appropriate for judicial resolution than for determination by the allegedly deceived authorities themselves. Such issues are in the "public domain" and they "cannot be fully explored in an internal * * * proceeding." *NLRB v. Marine Workers*, 391 U.S. 418, 425, 426, n. 8.

F. Supp. 115 (E. D. Pa.); *Beiski v. Eastern Auto Forwarding Co.*, 231 F. Supp. 710 (D. Del.), aff'd 354 F.2d 414 (3 Cir.); *Panza v. Armco Steel Corp.*, 208 F. Supp. 50 (W. D. Pa.); *Minkoff v. Scranton Frocks, Inc.*, 181 F. Supp. 542 (S. D. N. Y.), aff'd 279 F.2d 115 (2 Cir.); *Archuleta v. Grand Lodge IAM*, — Cal. App. 2d — , 262 Advance Cal. App. 228, 68 Cal. Rptr. 694 (1968); *Alberti v. North American Iron & Steel Co., Inc.*, 58 LRRM 2720 (N.Y. Sup. Ct., 1965); *In re American Newspaper Guild (North American Newspaper Alliance)*, 56 LRRM 2773 (N.Y. Sup. Ct., 1964); *Johnson v. American Can Co.*, 361 S.W. 2d 451 (Tex. Civ. App., 1962); *Clover v. Columbus Retail Merchants Delivery*, 115 Ohio App. 467, 187 N.E. 2d 658 (1962); *Dickinson v. C & O R. R. Co.*, 7 W. Va. 390, 429-430 (1874).

[5]The Section 10 standards of the Arbitration Act have been applied to suits arising under Section 301 of the National Labor Relations Act. *Transportation Workers v. Transportation Co.*, 283 F. Supp. 597 (E. D. Pa.); *U.E. v. Star Expansion Industries*, 246 F. Supp. 400 (S. D. N.Y.). Other provisions of the Arbitration Act have similarly been found applicable in determining the law under the NLRA. *Rhine v. Union Carbide Corp.*, 343 F.2d 12, 16 (6 Cir.); *Local 149, American Fed'n of Technical Eng'r v. General Electric Co.*, 250 F.2d 922, 928-929 (1 Cir.); *Hoover Motor Express Co. v. Teamsters Local 327*, 217 F.2d 49, 53 (6 Cir.); *Hill v. Aro Corp.*, 275 F. Supp. 482 (N. D. Ohio), 67 LRRM 2037; *Metal Products Local 1645 v. Torrington Co.*, 242 F. Supp. 813 (D. Conn.), aff'd 358 F.2d 103 (2 Cir.).

As agent of the union and the employers, the Joint Committee is inherently incapable of dealing, dispassionately and effectively, with claims that it was defrauded by either side. Its mere attempt to do so would inevitably create suspicion of bias and prejudice and thereby injure the industrial self-government system itself. *Cf. Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150. Thus, "[t]here cannot be any justification to make the public processes wait until the union member exhausts internal procedures plainly inadequate to deal" (*Marine Workers, supra)* with charges that the employer defrauded the Joint Committee.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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March 12, 1969

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APPENDIX

OPINION OF THE COURT OF APPEALS

No. 18052

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

David H. Durham, et al.,
Plaintiffs-Appellants,

v.

The Mason and Dixon Lines, Inc.,
Defendant-Appellee.

On Appeal from the U.S. District Court for the Western District of Kentucky.

Decided December 12, 1968.

Before: Weick, Chief Judge, and O'Sullivan and McCree, Circuit Judges.

McCree, Circuit Judge. Appellants instituted a class action in the District Court under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1964), for enforcement of certain seniority benefits to which they claimed they were entitled under the collective bargaining contract entered into between their union and appellee. The complaint alleged that appellee had procured a change in the collective bargaining agreement by means of fraudulent misrepresentations to the Joint Employer-Union Committee, a

body authorized by agreement to approve such changes, and that the change was in derogation of appellants' vested seniority rights. Appellee filed a motion to dismiss the action, alleging, *inter alia,* that the complaint failed to state a claim upon which relief could be granted and that appellants had failed to exhaust the grievance procedure provided in the collective bargaining agreement. The district judge, after receiving affidavits and exhibits from the parties, granted appellee's motion to dismiss. He did not, however, state which of the alleged grounds was the basis for the dismissal.

This omission is regrettable. The sustaining of a motion to dismiss for failure to state a claim upon which relief can be granted is a judgment on the merits.[1] *See* 2A J. Moore, Federal Practice, ¶12.09, at 2313 (2d ed. 1968). On the other hand, sustaining a motion to dismiss for failure to exhaust the grievance procedure provided in a collective bargaining agreement results only in a dismissal of the action without prejudice. *See* 6 J. Moore, Federal Practice ¶56.03, at 2052 (2d ed. 1966).

We hold that appellants failed to avail themselves of the grievance procedure provided in the contract prior to filing their action in the District Court. This failure to exhaust the grievance procedure deprived the District Court of jurisdiction and therefore precluded a decision on the merits. *Salvatore v. Allied Chemical Corp.*, 238 F. Supp. 232 (S.D. W.Va. 1965). Since the District Court could not reach the

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[1] We observe that the portion of appellee's motion to dismiss in which he alleged failure to state a claim upon which relief could be granted was converted into a motion for summary judgment under Rule 56 when appellee filed affidavits and exhibits in support of the motion. *See* Fed. R. Civ. P. 12(b). Of course, this merely serves to reinforce the fact that had the motion been granted for this reason the result would have been a judgment on the merits, since under Rule 56 only matters related to the merits can be raised. *See* 2A J. Moore, Federal Practice ¶ 12.09, at 2313 (2d ed. 1968).

merits, we will for this reason assume that the motion to dismiss was granted because of appellants' failure to exhaust the grievance procedure rather than because the complaint failed to state a claim. We affirm.

The general rule is that prior to filing an action in a federal court under Section 301 employees must attempt to use the grievance procedure agreed to by the employer and the union. *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 652 (1965). Appellants contend that because the Joint Employer-Union Committee, the body which ratified the change in the contract, is also the body through which grievances are to be processed, the grievance procedure was, when the Committee approved the change, in effect exhausted. The defect in this reasoning is that although the Committee approved the change in the contract, it did not at that time have before it and has not since been given an opportunity to rule on appellants' contention that its approval was procured by means of fraudulent misrepresentations on the part of appellee. [2] Until this allegation has been presented to the Committee, appellants cannot maintain that they have attempted to use the grievance procedure provided in the contract.

Having concluded that appellants' failure to exhaust the grievance procedure deprived the District Court of jurisdiction over the subject matter of the complaint, we affirm the granting of appellee's motion to dismiss the action.

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[2]The affidavit of employee Sheperd, the validity of which is questionable since it is based largely on hearsay, contained nothing which would require a different conclusion. Although Sheperd stated that grievances related to the employees' seniority rights had been processed to final hearings before the Committee, he did not assert that the allegation of appellee's fraud in obtaining the change in the contract had ever been passed on by the Committee. Also, the exhibit filed by appellee, which contained a list of all grievances filed as a result of the change in the contract, revealed that the fraud issue never had been presented to the Committee.

ORDER OF THE UNITED STATES DISTRICT COURT

ORDER

Filed March 31, 1967

On March 31, 1967, this case was heard in chambers on defendant's motion to dismiss. There appeared H. Solomon Horen for the plaintiffs and Edgar E. Zingman for the defendant.

The Court being advised,

IT IS ORDERED that the defendant's motion to dismiss is hereby sustained.

March 31, 1967

James F. Gordon
United States District Judge